



STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
OAL DOCKET NO. CRT 05381-2008N
DCR DOCKET NO. EG14NB-48882
EEOC CHARGE NO. 17E-2007-00685

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AZRA D. CAMPBELL,)	
)	
Complainant,)	ADMINISTRATIVE ACTION
)	
v.)	FINDINGS, DETERMINATION
)	AND ORDER
QUEST DIAGNOSTICS, INC.,)	
)	
Respondent.)	
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APPEARANCES:

James P. Madden, Esq., for the complainant Azra D. Campbell.

Karyn D. Jefferson, Esq., for the respondent Quest Diagnostics, Inc. (Law Offices of Karyn D. Jefferson, LLC., attorney).

Leland S. McGee, Deputy Attorney General, monitoring this matter on behalf of the New Jersey Division on Civil Rights (Anne Milgram, Attorney General of New Jersey, attorney)

BY THE DIRECTOR:

INTRODUCTION

This matter is before the Director of the New Jersey Division on Civil Rights (Division) pursuant to a verified complaint filed by Azra D. Campbell (Complainant), alleging that Quest Diagnostics, Inc. (Respondent) unlawfully discriminated against her based on disability in violation of the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49. On August 20, 2009, the Honorable Irene Jones, Administrative Law Judge (ALJ), issued an initial decision¹ dismissing

¹Hereinafter, "ID" shall refer to the initial decision of the ALJ; "CE" shall refer to Complainant's exceptions to the initial decision; "CAC" shall refer to Complainant's Attorney Certification submitted with the Complainant's exceptions; and "RAC" shall refer to Respondent's Attorney Certification filed in support of

the verified complaint for failure to prosecute. After independently evaluating the evidence, the parties' submissions and the ALJ's initial decision, the Director adopts the ALJ's dismissal of the complaint.

PROCEDURAL HISTORY

On August 17, 2007, Complainant filed a verified complaint with the Division alleging that Respondent unlawfully discriminated against her based on disability (chronic epicondylitis of her right elbow) by failing to provide her with reasonable accommodations and terminating her employment as a packer/specimen entry lab aide on or about February 21, 2007. Respondent's answers and responses to the Division's document and information request were received and filed by the Division on October 5, 2007 and November 2, 2007, respectively, both denying all allegations of unlawful discrimination. The Division began an investigation into the allegations contained in the verified complaint. Prior to the completion of the investigation, by way of letter dated November 26, 2007, Complainant, through counsel, requested that this matter be transmitted to the OAL as a contested case pursuant to N.J.A.C. 13:4-11.1 (c)² and N.J.S.A. 10:5-13. The Division complied with the request and transmitted the matter, which was stamped "FILED" by the OAL on April 24, 2008³. On July 22, 2009, Respondent, through counsel, filed a motion to dismiss the complaint with prejudice, to which Complainant did not respond despite being granted several extensions.

On August 20, 2009, the ALJ issued an initial decision dismissing the verified complaint with prejudice. After receiving two extensions of time for filing, Complainant submitted exceptions to the ID on September 11, 2009. As of the date of this Order, Respondent has not filed a reply to

Respondent's Motion to Dismiss filed July 22, 2009.

²Improperly cited by Complainant's counsel as N.J.A.C. 13:4-12.1(c) in his November 26, 2007 letter to the Division seeking transmittal of the matter as a contested case.

³Improperly referenced in the ID as April 24, 2007.

Complainant's exceptions. Having received the ID by way of electronic mail on August 20, 2009, the instant Order is due to be issued on Monday, October 5, 2009.

OAL PROCEEDINGS AND THE ALJ'S DECISION

Subsequent to the transmittal of the matter to the OAL as a contested case, a notice of filing was issued on May 5, 2008. Consistent therewith, Respondent served on Complainant its first set of interrogatories, request for the production of documents, and request for admissions on May 22, 2008. ID 2. Complainant's responses were due to Respondent on June 7, 2008. Complainant did not submit the information timely, RAC 2, and Respondent sent Complainant's counsel a letter dated June 10, 2008, informing him that since he had not responded to Respondent's request for admissions in a timely manner, the admissions are deemed admitted in their entirety under the provisions of the New Jersey Administrative Code. ID 2. Although the ALJ states in her ID that Complainant did not respond, ID 2, the record indicates that Complainant's counsel faxed a letter to Respondent and the ALJ opposing Respondent's assertions and highlighting the difficulties he was having in compiling, reviewing, and responding to Respondent's discovery requests. CAC Ex.A. His letter referenced the difficulty he had contacting Complainant since she took a job working the night shift after she was terminated by Respondent. Counsel conceded that although he assumed the discovery requests had reached his client on or about May 28, 2008, he did not provide her with a deadline for responding to his instructions. CAC Ex A.

A pre-hearing conference was conducted by telephone on August 7, 2008⁴, and a Pre-Hearing Order (PHO) was issued by ALJ Jones on August 14, 2008. ID 2. According to the Order, Complainant was to serve her first round of discovery by August 29, 2008, and both parties were to answer initial discovery by September 30, 2008. The PHO required the parties to serve their second round of discovery by October 30, 2008, with responses due on November 30, 2008. In

⁴Improperly referenced in the ID as August 7, 2007.

addition, an OAL settlement conference was scheduled for December 17, 2008, and the hearing was scheduled for January 27, 2009 and January 28, 2009.

As required, Respondent provided answers to Complainant's discovery requests on September 30, 2008. Complainant did not answer Respondent's initial discovery by September 30, 2008 as required by the PHO, but did secure an extension from Respondent until October 7, 2008. ID 2-3, RAC 3. On October 6, 2008, counsel for Complainant requested another extension until October 14, 2008, which was granted. Complainant again failed to provide answers. ID 3.

On October 24, 2008, Complainant's counsel forwarded a letter to ALJ Jones in which he stated that for the majority of the preceding three weeks, he had been out of the office due to health issues, including recent diagnoses of hypertension, diabetes, and an inflamed liver. He stated that these were the reasons why the discovery deadlines were not met, and requested a telephonic conference with the parties and the ALJ to discuss the matter. ID 3, CAC 3. With his exceptions, counsel includes a copy of a medical note from his personal physician, dated October 24, 2008, that he did not include in the record or otherwise submit to the ALJ but filed with the Superior Court relating to cases he was handling at the time, in that forum, which describes his condition and asks that "his duties as a trial attorney be postponed for approximately 2 months until his condition stabilizes." CAC 1 and CAC Ex.B.

Respondent contacted the OAL by phone on December 17, 2008 for the settlement conference that had been scheduled as part of the PHO. Counsel for complainant concedes that neither he nor his client were available. CE 3. The ALJ then scheduled an in-person status conference for January 21, 2009, six days before the hearings were to begin. Counsel for Complainant requested an adjournment due to the unavailability of his client and his health issues. ID 3. The request was granted with the proviso that the parties engage in settlement discussions. Despite repeated attempts by Respondent to obtain a settlement demand or otherwise engage in

negotiations, no progress was made due to counsel's unavailability and acknowledged inability to obtain a settlement demand from his client. ID 3, CE 3, RAC 4.

Consequently, Respondent moved to dismiss the claim on July 22, 2009. ID 3. Complainant requested an additional 14 days to respond, which was granted by way of letter on July 30, 2009. In counsel's extension request, he also argued that, under the New Jersey Court Rules, a motion for dismissal with prejudice cannot be granted before a motion for dismissal without prejudice is made. CAC Ex. G. On August 14, 2009, Respondent sent a letter to the ALJ urging her to grant the motion as unopposed since Complainant did not file a response. On August 18, 2009, Complainant's counsel sought another 14 day extension and sought to respond to the August 14, 2009 letter. CAC Ex. H.

Without ruling on Complainant's August 18, 2009 request, the ALJ issued her initial decision on August 20, 2009 dismissing the case with prejudice for Complainant's failure to prosecute this matter. The ALJ also found that Complainant failed to demonstrate any good cause for repeatedly failing to answer discovery "or otherwise move this matter beyond the filing of the complaint with the [Division] and EEOC." ID 3.

The ID was transmitted to the Division by electronic mail on August 20, 2009. Exceptions were due by September 2, 2009 and replies were due by September 9, 2009. On September 2, 2009, counsel for Complainant requested an extension from the Division because of computer related issues in his office and pressing Superior Court appearances. This extension was granted. On September 8, 2009, counsel requested a second three-day extension until Friday, September 11, 2009. This request was also granted, despite Respondent's objections in a letter dated September 9, 2009. Counsel submitted the exceptions by facsimile time-stamped "September 11, 2009 23:49." His attorney certification arrived by fax on Saturday, September 12, 2009. As of the date of this Order, no reply to Complainant's exceptions have been received by the Division.

EXCEPTIONS TO THE INITIAL DECISION

Complainant's counsel submitted exceptions to the ID on September 11, 2009 in the form of a four page letter brief. The majority of the brief outlines the extensive procedural history stated above and need not be reiterated here. CE 1-3. Complainant's principal argument is that the ALJ erred in dismissing the matter with prejudice as Complainant had demonstrated good cause and extraordinary circumstances why she has not complied with the discovery orders. Counsel urges the Director to take judicial notice of the effects his severe health problems had on his ability to handle his practice and his inability, as a sole practitioner, to delegate any aspect of this case to another staff member. CE 2-3. Complainant states that the rules promulgated under the Administrative Procedure Act (APA) allow for relaxation of the rules upon a showing of good cause and extraordinary circumstances, and that she has met that standard here. CE 1-4, citing Klajman v. Fair Lawn Estates, 292 N.J. Super. 54 (App. Div.) certif. den., 146 N.J. 569 (1996). Complainant argues that the sanction of dismissal with prejudice should be imposed sparingly, and the imposition of that sanction was unreasonable in light of the circumstances of this case. CE 4, citing Arbtrax Pharmaceuticals Inc., v. Elkins Sinn, Inc. 139 N.J. 499,513 (1995).

Complainant also argues that while the APA rules do not specify the standards by which particular sanctions are to be imposed when discovery is not provided, the Division can be guided by the New Jersey Rules of Court and their common law interpretation. CE 4. Complainant argues that the two-tier procedure set forth by New Jersey Court Rule 4:23-5 should apply. That rule provides that there be adequate notice of the sanction sought; requires counsel to confer before the motion is made; and provides that the dismissal be without prejudice so that it can be cured if the discovery is provided within 60 days of the dismissal. CE 4. According to Complainant, a matter may be dismissed with prejudice only after such a procedure is employed and discovery still is not provided. Ibid. Complainant additionally argues that the failure to provide discovery was not deliberate or contumacious, citing Zacardi v. Becker 88 NJ 245, 253 (1982).

THE DIRECTOR'S DECISION

The Legislature has authorized the OAL to regulate the conduct of contested cases by developing and administering "uniform standards and procedures." See N.J.S.A. 52:14F-5(e), (g). See also In Re Uniform Administrative Procedure Rules, 90 N.J. 85 (1982); In Re Shelton College, 109 N.J. Super. 480 (App. Div. 1970). By virtue of the OAL's enabling legislation, N.J.S.A. 52:14F-1 to-13, an administrative law judge enjoys certain powers designed to facilitate the expeditious and just resolution of contested cases. See, e.g., N.J.A.C. 1:1 - 14.1 to -14.14. See also In Re Uniform Administrative Procedure Rules, supra at 106. An ALJ may "utilize his or her sanction powers to ensure the proper conduct of the parties and their representatives appearing in the matter." N.J.A.C. 1:1-14.6 (j). Hence, under the Uniform Administrative Procedure Rules (Rules), an administrative law judge may dismiss a claim as a sanction against a party who unreasonably fails to comply with the orders of the ALJ. N.J.A.C. 1:1-14.4. This sanction is expressly available to a judge when a party unreasonably fails to comply with discovery orders. N.J.A.C. 1:1-10.5.

It is well settled that the ultimate sanction of dismissal should be imposed sparingly. Zaccardi v. Becker, 88 N.J. 245 (1982). Nevertheless, the New Jersey Supreme Court has acknowledged that a party invites this extreme sanction by "deliberately pursuing a course that thwarts persistent efforts to obtain the necessary facts." Abtrax Pharmaceuticals, Inc. v. Elkins-Sinn, Inc., 139 N.J. 499, 515 (1995). Courts have dismissed a plaintiff's case specifically because a plaintiff has failed to answer interrogatories within a reasonable time. Id., citing Crews v. Garmonney, 141 N.J. Super. 93 (App. Div. 1976) and Comeford v. Flagship Furniture Clearance Center, 198 N.J. Super. 514 (App. Div. 1983).

In this case, Complainant repeatedly failed to reply to Respondent's discovery, initially served upon her on May 22, 2008, despite the granting of numerous extensions. On at least two occasions, deadlines were apparently ignored without so much as a request for an extension. The

record shows that Complainant and her counsel also failed to participate in a settlement conference scheduled by order of the ALJ for December 17, 2008. When the ALJ then scheduled an in-person status conference for January 21, 2009, six days before the start of the hearing, counsel requested an adjournment. When even this adjournment was granted, with the proviso that the parties engage in settlement discussions, counsel for Complainant concedes he was unable to extract a settlement demand from his client. When Respondent filed its motion to dismiss, Complainant was afforded at least two extensions to reply to the motion, but failed to do so. Ultimately, the ALJ granted the motion and dismissed Complainant's complaint with prejudice.

In Complainant's exceptions, counsel argues that his poor health led to his inability to timely respond to discovery, and he urges a relaxation of the rules "to avoid manifest injustice." While the Director is cognizant of the health issues outlined in the record, he notes that the medical note cited above only referenced a two month impact upon counsel's practice, a period which ended in December 2008. There was no further medical information in the record outlining counsel's disability or its impact upon his ability to practice law. While one may empathize with the challenges of a sole practitioner who is confronted with difficult health problems, there is nothing in the record that would excuse counsel's failure to respect judge-ordered deadlines or his unwillingness to make the necessary arrangements to ensure this case was properly handled.

In addition, counsel references his difficulties in communicating with his client as early as June 10, 2008. CE 3. There are at least two other places in the record where counsel references the unavailability of his client. The Director notes that difficulty in communicating with one's client happens as a matter of course, and cannot by itself, in the interest of fairness or justice, stand to justify a more than one year delay in providing discovery. Counsel's suggestion that his client was in part responsible for the failures to respond to discovery demands or appear at conferences does not provide a basis for reversing the ALJ's dismissal.

Finally, Complainant argues that because the Rules do not provide specific standards by which sanctions may be imposed when a litigant fails to provide discovery, the ALJ should have relied on the standards in the corresponding Court Rules. Specifically, Complainant refers to R. 4:23-5(a) which requires that a judge initially dismiss a matter without prejudice to allow the offending party to cure the defect in its response before the ultimate sanction of dismissal is imposed. The Director is unpersuaded. The Rules make clear that an administrative law judge has absolute discretion whether to follow the New Jersey Court Rules in the absence of an APA rule regarding a particular issue. N.J.A.C. 1:1-1.3. Moreover, Complainant has had countless opportunities to provide the required responses to discovery. As of the date of this Order, Complainant has failed to produce responses to Respondent's discovery requests that were served well over a year ago. Counsel's argument would have been more compelling had his exceptions been accompanied by documents responsive to the discovery request. Accordingly, the Director finds that given the unique circumstances of this matter, and the myriad of extensions and adjournments outlined herein, Complainant has had sufficient opportunity to comply with the ALJ's order and avoid the ultimate sanction of dismissal with prejudice.

In light of the foregoing, and after conducting an independent review of the record, the Director adopts ALJ Jones' initial decision dismissing the verified complaint with prejudice.

DATE: 10/02/09



CHINH Q. LE, ESQ., DIRECTOR
NEW JERSEY DIVISION ON CIVIL RIGHTS